SUPREME COURT, U.S.

Supreme Court, U.S.
FILED
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MICHAEL RODAK, JR.

IN THE SUPREME COURT OF THE UNITED STATES

No. 74-1356

EDITH RALEY,

Petitioner,

vs.

JESSIE LEWIS NICHOLAS
and GRACE NICHOLAS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH DISTRICT

BRIEF
IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

Respondent believes that the issues in this case do not revolve around a conflict between the opinion of the Tenth Circuit Court of Appeals and other Circuit Courts of Appeals; nor is the question involved one of bankruptcy; nor does the Opinion of the Court of Appeals, in this case, conflict with any of the pronouncements of the Supreme Court of the United States. The Court of Appeals followed the law of the forum.

The Supreme Court of New Mexico in the case of Kuzemchak v. Pitchford, 81 NM 438, 468 P.2d 409 (1970) Certiorari denied, 400 U.S. 833, 91 S. Ct. 66, established the law of this forum. The Court stated the question as follows:

> "May the judgment creditor go behind his judgment, and if so, how far, when the issue as to its dischargeability is raised?"

The Court concluded that the rule in New Mexico should be: "That a review of the whole record, including testimony, is permitted to determine the nature of the claim." The Court rejected the argument that the judgment is conclusive and also rejected the proposition that extrinsic evidence should be permitted to enlarge or explain the transcript of the proceedings. This determination of the Supreme Court of New Mexico thus became the law of the forum. The cases cited by Petitioner to sustain the proposition that there is a conflict between the various courts of appeals are not in point in that they are not based upon the law of the State of New Mexico but are presumably

based upon the laws of the State in which the Court was sitting. This Court, in the case of Erie Railroad Company v. Thompson, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938) held that:

> ". . . the law to be applied in any case is the law of the State. And, whether the law of the State shall be declared by its Legislature in a statute or by its highest court by decision is not a matter of Federal concern. There is no Federal general common law."

This case was followed in Claxon Company v. Stentor Electric Manufacturing Company, 313 U.S. 487; 61 S. Ct. 1020, 85 L. Ed. 1477 (1941), which also held that the law of the forum controls.

The Court of Appeals for the Eighth Circuit in Cervantes v. Time, Inc., 464 F.2d 986 (1972), at page 989, Note 5, has briefed the whole subject of the applicability of the law of the forum to the admission of evidence and concludes that the law of the forum prevails.

The Supreme Court of New Mexico in the Kuzemchak case, supra, has determined what evidence is admissible to determine the foundation of a judgment and has held that a court could only look at the record and could not hear extrinsic evidence.

An exemplified copy of the proceedings in the Dona Ana County District Court was submitted to the Referee in Bankruptcy. There was no fraud alleged in the complaint, and since there was a default judgment, no

testimony was taken. As pointed out by the Court of Appeals, the Affidavit filed by Mrs. Raley's son did not raise the question or an issue of fact; he merely stated that Respondents admitted breaching the contract. Breach of contract was the only cause submitted for recovery of the Judgment. Furthermore, assuming that Raley's affidavit had created an issue of fact, it was not admissible in evidence under the Kuzemchak case, supra, because it was not contained within the issues set forth in the complaint, nor was there any testimony showing that it was an issue at the time the judgment was entered. It is difficult to have a genuine issue of fact when under the law of the forum there is no admissible evidence which would give rise to an issue of fact.

The question presented here is exactly the same question which was disposed of adversely to the position of the Petitioner in the Kuzemchak case, supra. Petitioner is asking this court to reverse the Supreme Court of New Mexico in a matter of local law.

CONCLUSION

It is respectfully submitted that there are no grounds to issue a Writ of Certiorari in this case because there is no conflict between the opinions of the various courts of appeals of the United States; that the Referee in Bankruptcy, the U. S. District Judge and the Court of Appeals of the Tenth Circuit followed the law of the forum as pronounced by the Supreme Court of New Mexico, and there

is no genuine issue of fact presented which could be resolved by a second trial. In the Kuzemchak case, supra, the Supreme Court of New Mexico did not attempt in any way to interpret or adjudicate anyone's rights under the Bankruptcy law. All it did was pronounce a rule of evidence in the State of New Mexico.

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